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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF KANSAS
Plaintiff-Petitioner

vs.

LLOYD D. CLOTHIER,
Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED

Do state statutes allowing the use of force likely to cause death or great bodily harm in defense of a dwelling and property other than a dwelling, absent a reasonable belief that such force is necessary to prevent death or great bodily harm violate the Fourteenth Amendment rights to Due Process and Equal Protection?

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THE STATE OF KANSAS,

Plaintiff-Petitioner,

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LLOYD D. CLOTHIER,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

_____

The State of Kansas, as Petitioner, respectfully asks for a writ of certiorari granting review of the decision of the Supreme Court of the State of Kansas entered April 29, 1988, denying the State's appeal on a question reserved involving the constitutionality of two state statutes, K.S.A. 21-3212 and K.S.A. 21-3213.

OPINION DELIVERED IN THE COURT BELOW

The opinion filed by the Kansas Supreme Court is reported as State v. Lloyd D. Clothier, 243 Kan. 81, ___ P. 2d ___ (1988), a copy of which is attached hereto as Appendix A. This decision denied the State's appeal in which the State questioned the constitutionality of two jury instructions (and the Kansas statutes upon which they were based) dealing with the use of deadly force to defend a dwelling and property other than a dwelling. An excerpt of the trial transcript in which the trial court declined to follow the State's requested instructions is attached hereto as Appendix B.

This assertion was based upon the denial of Due Process and Equal Protection under the Fourteenth Amendment to the United States Constitution, and §§ 1 and 2 of the Kansas Bill of Rights,

and referred by analogy to Tennesee v. Garner, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985). Garner was decided based upon the Fourth Amendment prohibition against unreasonable seizures, and held that the use of deadly force by a police officer to stop a non-violent, fleeing felon, without probable cause to believe the officer was in fear for his life, or threatened with great bodily harm was unconstitutional.

JURISDICTION

Petitioner seeks review of the decision of the Kansas Supreme Court, the court of last resort in the State of Kansas, filed April 29, 1988. This petition is filed within the sixty days following the decision to be reviewed pursuant to 28 U.S.C. § 2101(d), Sup. Ct. Rule 20.1, and Sup. Ct. Rule 20.4. Jurisdiction is conferred upon this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

> No State shall . . . deprive any person of life . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1, Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On the morning of November 23, 1986, the defendant was awakened for the second time that morning around 3:30 a.m. by his dog's barking and growling. He retrieved his loaded gun from the nightstand, and went to the dining room window to look outside. The defendant did not turn on any outdoor or indoor lights before looking outside, nor did he call the police.

The defendant saw someone by his Suburban van, reaching inside. Instead of

calling the police, he closed his eyes and fired through the dining room window in the direction of his boat which was parked next to the van. Upon opening his eyes, the defendant saw a second person run behind the van, and fired a second shot through the window, aiming toward the grass. A bullet found its way to fifteen year old Seanan Picard, who died a short time later from the gunshot wound to his head.

The defendant was tried and acquitted of involuntary manslaughter based upon K.S.A. 21-3404. During the course of the trial, the defendant stated for the first time that the reason he had shot without turning on lights, calling the police, or sending out his dog, was because he thought the victim might see his garage door opener in the van, and perhaps try to use it to enter the locked house. He also testified that

he never saw the victim get into the van, nor did he see an weapon or any other object in the prowler's hands.

The jury was instructed upon the theory of the defense of a dwelling and of property other than a dwelling under K.S.A. 21-3212 and K.S.A. 21-3213, and the Pattern Criminal Jury Instructions for Kansas (P.I.K. Crim. 2d) 54.18 and 54.19, without the instructions requested by the State limiting the use of force likely to cause death or great bodily harm to instances where the actor had a reasonable belief that such force was necessary to prevent death or great bodily harm to himself or another, as is required to assert self-defense or defense of another person. State v. Cates, 223 Kan. 724, 729, 576 P. 2d 657 (1978); State v. Woods, 222 Kan. 179, 183-184, 563 P. 2d 1061 (1977); State v. Blocker, 211 Kan. 185, 192, 194, 505 P.

2d 1099 (1973). K.S.A. 21-3212 reads as follows:

> **Use of force in defense of dwelling.** A person is justified in the use of force against another when and to the extent that it appears to him and he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon his dwelling.

K.S.A. 21-2313 states:

> **Use of force in defense of property other than a dwelling.** A person who is lawfully in possession of property other than a dwelling is justified in the threat or use of force against another for the purpose of preventing or terminating an unlawful interference with such property. Only such degree of force or threat thereof as a reasonable man would deem necessary to prevent or terminate the interference may intentionally be used.

The instructions given by the trial court to the jury followed this language verbatim, and added the following required under Kansas law on defense of both a dwelling and other property (State

v. Simon, 231 Kan. 572, 575, 646 P. 2d 1119 [1982]; P.I.K. Crim. 2d 54.18 and 54.19):

> Such justification requires both a belief on the part of the defendant and the existence of facts that would persuade a reasonable person to that belief.

The State of Kansas argued before the trial court that without the limitation on the use of deadly force to circumstances where it is needed to prevent death or great bodily harm, the instructions (and necessarily the statutes upon which the instructions were based) violated the Constitution because "the preservation of human life is much more important [than property rights] and that when deadly force is used it can only be used under strictly scrutinized parameters. . . " (IV R. 574-575). (See Appendix B).

The State's argument was based upon an analogy to the case of Tennesee

v. Garner, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) in which this Court held that it was a violation of the Fourth Amendment's prohibition against unreasonable seizures for a police officer to use deadly force to stop a non-violent, unarmed fleeing felon, without first having probable cause to believe that the officer or another person was in imminent danger of the threat of death or great bodily harm. To allow a state government to immunize the lay public from the consequences of the use of deadly force by providing them a defense not available to law enforcement officers trained and experienced as representatives of law and order constitutes "state action" which denies the victims of the civilian vigilantes the constitutional guarantees of due process and equal protection found in the Fourteenth Amendment. (IV

R. 572-575); State v.Clothier, 243 Kan. at 84-85 (Appendix A). See also Appendix C (pertinent pages of Petioner's brief to the Kansas Supreme Court).

The jury was instructed as per the statutes involved, with the trial judge stating in response to the State's objections that the instructions were "no more and no less" than was mandated by the legislature (IV R. 572, 578). (Appendix B). The jury acquitted the defendant.

The State appealed the issue on a question reserved, and argued in its brief and in oral argument as was done before the trial court: that the statutes violated the Fourteenth Amendment to the United States Constitution, and §§ 1 and 2 of the Kansas Bill of Rights by denying the victim and therefore all citizens, of life-- the most fundamental of rights--

without the due process requirements of a trial and proof of guilt beyond a reasonable doubt, and without the equal protection of the law. (Appendix C). If it is unconstitutional to use deadly force without the threat of death or great bodily harm under the Fourth Amendment, then by analogy, it is also unconstitutional under the Fourteenth Amendment when the State sanctions such action. Id.

The Kansas Supreme Court denied the appeal on April 29, 1988 by ruling that the jury instructions were proper and that the two statutes did not violate the Fourth Amendment, although the court had been presented with the issues in terms of the Fourteenth Amendment. State v. Clothier, 243 Kan. 81, Syl. ¶ 2, 85, ___ P. 2d ___ (1988) (Appendix A and C). The Kansas Supreme Court acknowledged that the State had raised a

> "constitutional issue" alleging the creation by the legislature of defenses constituting "state action" in the determination of the "reasonable or unreasonable . . . use of force in defense of. . . property"

but deemed the issue one for the legislature. 243 Kan. at 84-85. The only issues presented to the Kansas Supreme Court involved the constitutionality of the statutes in question. Although the decision rested upon Fourth Amendment grounds--an assertion not raised by the Appellant other than in terms of analogy to the Garner rationale-- that court nonetheless decided the constitutional issue adverse to this Petitioner. This Court may therefore determine the issues based upon the Fourteenth Amendment claims consistently asserted by the State herein through out the trial and appeal of this case in the courts of Kansas. See Murdock v. Mayor, etc, of Memphis, 87

U.S. 429, 444, 20 Wall 590 (1875).

Petitioner, as the law enforcement representative of the citizens of Kansas, requests a writ of certiorari to determine the constitutionality of the Kansas state statutes which deny the citizens of Kansas and the United States their Fourteenth Amendment rights to due process and equal protection of the law, by analogy to the rulings and rationale in Tennesee v. Garner, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985).

REASONS FOR GRANTING THE WRIT

THE RULINGS OF THE DISTRICT AND SUPREME COURT OF THE STATE OF KANSAS DENY ALL CITIZENS THE FOURTEENTH AMENDMENT RIGHTS OF DUE PROCESS AND EQUAL PROTECTION BY FAILING TO DECLARE UNCONSTITUTIONAL STATE STATUTES WHICH CREATE A DEFENSE FOR PRIVATE CITIZENS TO THE USE OF DEADLY FORCE WHEN THE USE OF SUCH FORCE HAS BEEN HELD UNCONSTITUTIONAL WHEN THE ACTOR IS A LAW ENFORCEMENT OFFICER.

I. EQUAL PROTECTION ARGUMENT

The right to life is a fundamental, inalienable, natural right, explicitly guaranteed to each citizen of the United States, and which may not be denied without the equal protection of the law. U.S. Const. amend. XIV; Tennessee v. Garner, 471 U.S. 1, 9, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985); Screws v. United States, 325 U.S. 91, 123, 134-135, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945) (concurring and dissenting opinions); Mattis v. Schnarr, 547 F. 2d 1007, 1017 and n. 23 (8th Cir. 1976), vacated moot sub nom. Ashcraft v. Mattis, 431 U.S. 171 (1977). The statutes in question must therefore be strictly scutinized to determine if they are impermissible burdens upon the constitutional right to life. See San Antonio School District v. Rodriques, 411 U.S. 1, 36 L. Ed.

2d 16, 93 S. Ct. 1278 (1973), reh. den. 411 U.S. 959. The importance of human life, and its taking without constitutional safeguards, has been consistently recognized in decisions of this Court and of the Federal Circuit Courts as exemplified by Tennessee v. Garner, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) where this Court stated:

> The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual and of society in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. . .[W]e are not convinced that the use of deadly force is a sufficiently productive means of accomplishing [the goals of effective law enforcement] to justify the killing of nonviolent suspects.
>
> . . . The use of deadly force is a self-defeating way of apprehending a suspect and so setting he criminal justice mechanism in motion. If successful, it guarantees that that mechanism

> will not be set in motion... I t is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

Id. at 471 U.S. 9-10 (emphasis added).

Although this case dealt with a civil action for damages pursuant to 42 U.S.C. § 1983, the above language indicates not only a recognition for a need to change in the area of law enforcement practices, but also appears to recognize that the fundamental interest in life calls for due process, in the form of the proper determinations of guilt or innocence within the system, before a life can be summarily deprived, as was Seanan Picard's. The Court recognized that the need for the common law rule allowing any force to arrest a fleeing felon developed at a time when most felonies were punishable by death,

and the occurence of a suspect's death before conviction was of no greater consequence than his ultimate punishment. Tennesee v. Garner, 471 U.S. at 4, 11, 14. Noting that the modern trend has been away from such use of force, the Court ultimately ruled as it did. Id. at 18-20.

No one has a vested right in any rule of law entitling him to insist it remain unchanged in violation of the Constitution; the law must respond to the needs of the people in a changing, dynamic society. Walz v. Tax Commissioner, 397 U.S. 664, 678, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970); New York Central R.R. Co. v. White, 243 U.S. 188, 198, 61 L. Ed. 667, 37 S. Ct. 247 (1916). Although a State may adopt legislation changing the common law when it is reasonably necessary, based upon its "police power" exercised to promote

public safety, when this legislation abridges fundamental rights, it must be struck down. Berman v. Parker, 348 U.S. 26, 32, 99 L. Ed. 27, 75 S. Ct 98 (1954); Palko v. Connecticut, 302 U.S. 319, 327, 82 L. Ed. 288, 58 S. Ct. 149 (1937). The common law rule allowing the killing of a fleeing, nonviolent felon has been recognized as having "outlived its underpinnings of principle and policy." Jacobs v. City of Wichita, 531 F. Supp. 129, 131 (D. Kan. 1982). The law recognizes the right to use self-defense only in circumstances involving the threat of death or great bodily harm. This Court should recognize the need to address and change laws which give greater deferrence to property than to human life by striking down the Kansas statutes which allow this inequity.

In a situation where the

antagonist is armed, both a private Kansas citizen and the police are protected from criminal liability if they use deadly force to protect a life. Tennesee v. Garner, 471 U.S. at 11-12; Brown v. United States, 256 U.S. 335, 65 L. Ed. 961, 41 S. Ct. 501 (1921); Beard v. United States, 158 U.S. 550, 39 L. Ed. 1086, 15 S. Ct. 962 (1895); State v. Gregory, 218 Kan. 180, Syl. ¶ 5, 542 P. 2d 1051 (1975); K.S.A. 21-3211; K.S.A. 21-3215(1). But when the felon is unarmed and nonviolent, the ruling of the Kansas Supreme Court has denied equal application of the law by allowing a state legislated defense to apply to private citizens, condoning their use of deadly force in the same situation where it has been held a law enforcement officer cannot. There is no compelling state interest in having statutes which deny the fundamental right of life to

members of the public without equal protection to unarmed victims killed by a private citizen in circumstances where a trained police officer could not do the same. The statutes should have been, and must now be, struck down. Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967).

The use of deadly force by an actor should not depend upon the status of the triggerman, but rather should be used when a necessity to prevent death or great bodily harm exists, thereby placing the fundamental right to life above a mere interest in property. See Taylor v. Collins, 574 F. Supp. 1554 (E.D. Mich. 1983) (following Tennesse v. Garner). By upholding the two Kansas statutes as constitutional, the Kansas Supreme Court has validated the "disparity in treatment by a State between classes of individuals whose

situations are arguably indistingishable. Ross v. Moffitt, 417 U.S. 600, 609, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974).

II. DUE PROCESS ARGUMENT

No person shall be denied the fundamental right to life without due process of law. Roe v. Wade, 410 U.S. 113, 157, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973) reh. den. 410 U.S. 959; Johnson v. Zerbst, 304 U.S. 458, 462, 82 L. Ed. 2d 1461, 58 S. Ct. 1019 (1938). This includes the procedural safeguards, referred to in Tennessee v. Garner of determining guilt or innocence through the criminal justice system by way of trial requiring proof beyond a reasonable doubt shown by the prosecution. Palko v. Connecticut, 302 U.S. 319, 327, 82 L. Ed. 288, 58 S. Ct. 149, 153 (1937); Mullaney v. Wilbur, 421 U.S. 684, 701, 704, 44 L.

Ed. 2d 508, 95 S. Ct. 1881 (1975). The applicable test in determining whether legislation transgresses upon the guarantee of due process is whether or not the statute bears a rational relationship to a permissible legislative objective. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1936). In making this decision, the Court must balance all relevant and conflicting factors involved. Bartkus v. Illinois, 359 U.S. 121, 128, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959), reh. den. 360 U.S. 907.

There is no reasonable basis to allow private citizens to kill nonviolent, would-be car burglars when the punishment for the crime being committed by Seanan Picard at the time of his death had he been an adult, would have been a maximum prison term of 3-10 years, imposed after all the attendant

procedural safeguards provided by a trial by jury requiring proof beyond a reasonable. K.S.A. 21-3715; K.S.A. 1987 Supp. 21-4501 (d) (2). The only state interest that could possibly be sufficiently compelling to justify such a killing would be in protecting the life or safety of oneself or that of another. See Jacobs v. City of Wichita, 531 F. Supp. 129 (D. Kan. 1982).

There is no reasonable basis to afford greater protection in civil or criminal actions to a private citizen in protecting his property than is given any other person in protecting human life. To do so is to authorize the unjustified summary execution of a suspect, without benefit of a trial, or other procedural safeguards of due process of law, for a mere property crime. This is a state sanctioned act which is abhorrent to the Constitution of both Kansas and the

United States, and which can not stand up to the strict scrutiny given such statutes which impinge on fundamental rights. See Mattis v. Schnarr, 547 F. 2d 1007, 1019, n. 29 (8th Cir. 1976), vacated moot sub nom. Ashcraft v. Mattis, 431 U.S. 171 (1977). To allow these statutes to remain intact is to deny citizens protection from the unjustified deprivation of life which the due process clause is meant to protect. Carey v. Piphus, 435 U.S. 247, 259, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978).

III. THE NEED FOR A UNIVERSAL DECISION

There is diversity among the many states, with no definitive, universal solution on the issue of using deadly force to defend one's home and property. For example, Tex. Pen. Code Ann. § 9.42 (Vernon 1974) states that a person may justifiably use deadly force against

another to protect land or tangible, movable property. This statue goes so far as to permit the use of deadly force to prevent one from fleeing with property, even though the escapee is no longer a threat to the defender. McDonald v. State, 597 S.W. 2d 365 (Tex. App) cert. denied 449 U.S. 1010 (1980).

Colorado, with the infamous "make my day" law allows the defender to employ deadly force to protect a home if the intruder has 1) made an unlawful and entry and 2) if the occupant reasonably believes that the intruder might use any type of physical force, no matter how slight, against any occupant. Colo. Rev. Stat. § 18-1-704.5 (1986). Even this state, however, limits the use of deadly force in protecting property from interference to situations where there is imminent danger of death or bodily harm. Id. at §§ 18-1-704 and 18-1-706.

Other states, such as Illinois and Wisconsin, require a reasonable belief of imminent death or great bodily harm before deadly force may be employed without legal sanction when defending dwelling, property, or human life. Ill. Rev. Stat. ch. 38, §§ 7-1 - 7-3 (1977); People v. Brown, 433 N. E. 2d 1081 (Ill. App. 1982); Wisc. Stat. Ann. §§ 939.48-.49 cited in State v. Kuta, 68 Wis. 2d 641, 229 N.W. 2d 580 (1975). See also Mo. Stat. Ann. §§ 563.031-.036, 563.041 (Vernon 1979). Some states have even held that it is per se unreasonable and excessive force as a matter of law to use deadly force absent necessity. Conner v. Florida, 361 So. 2d 774, 776 (Fla. App. 1978); State v. Jones, 299 N.C. 103, 261 S.E. 2d 1, 8 (1979); State v. Weber, 246 Or. 312, 423 P. 2d 767, 770 (1967), cert. den. 389 U.S. 863; State v. Griffith, 91 Wash. 2d 572, 589 P. 2d 799,

803 (1979).

Use of deadly force to defend a dwelling in these and other states is seen as an extention of the right to self-defense, and requires that an actual attempt or entry of the dwelling be attained, along with the reasonable belief that the intruder intends to commit a felony therein. Falco v. State, 407 So. 2d 203 (Fla. 1981); State v. Ivicsics, 604 S.W. 2d 773 (Mo. App. 1980); State v. Taylor, 143 Mo. 150, 44 S.W. 785 (1898); Colo. Rev. Stat. § 18-1-704.5 (1986); Fla. Stat. Ann. §§ 776.031, 776.08 (West 1976 and Supp. 1988); Ore. Rev. Stat. §§ 161.225, 161.229 (1986). See also 1 Wharton's Crim. Law and Procedure §§ 220-221 (1957). Yet the Kansas statutes, which were derived from those of Illinois and Wisconsin, (See Judicial Council Comments to K.S.A. 21-3211-K.S.A. 21-3213) allow the jury to



decide when such use is reasonable when property is concerned, even though the law decides when it is reasonable in defense of a life.

Many states already follow the path asserted by the Petitioner herein by holding that the use of deadly force which results in the taking of human life merely to defend any property is never reasonable, nor is this interest superior to the interest in human life. Brown v. State, 149 Ark. 588, 233 S.W. 762, 763 (1921); Chapman v. Kentucky, 12 Ky. L. Rep. 704, 15 S.W. 50, 51 (1891); State v. McCombs, 297 N.C. 151, 253 S.E. 2d 906, 911 (1979); State v. Hedgepath, 46 N.C. App. 569, 265 S.E. 2d 413, 416 (1980).

Lastly, states like California and New York have adopted the Model Penal Code. This is more specific in its requirements, limiting deadly force to instances in which there is substantial

risk to the person. Deadly force may be utilized if the occupant believes that the trespasser is attempting to commit a felony and either (1) has employed or threatened deadly force against or in the presence of the occupant, or (2) the use of force other than deadly force would expose the occupant or another to substantial danger or serious bodily harm. Cal. Penal Code §§ 197-198.5 (West 1988); N.Y Penal Law §§ 35.15(2), 35.20(3) (McKinney 1987). See also LaFave and Scott, Crim. Law § 5.9, p. 467 (2d Ed. 1986).

CONCLUSION

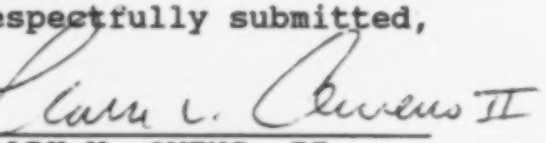
The current differences in state law regarding the degree of force which may be used to protect property is inherently unjust and unconstitutional. It is absurd that a person who guns down

a fifteen year old boy for tampering with
his vehicle may be held to answer for his use of excessive force in one state, but may shoot with impunity in another.

By upholding these statutes which grant greater deferrence to property than to human life in circumstances where this Court has ruled such action unconstitutional if the actor is a trained law enforcement officer, the Kansas Supreme Court has created a State sanctioned defense for vigilante violence which is repugnant to both the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution. The state action of creating such legislative defenses allowing private citizens to kill when law enforcement officials cannot must be examined with great scrutiny by this Court so as to obtain a definitive,

universal answer on the issue of deadly force absent the threat of death or harm to human life.

Respectfully submitted,



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APPENDIX A

State v. Clothier

No. 61,006

STATE OF KANSAS, Appellant, v. LLOYD D. CLOTHIER, Appellee

SYLLABUS BY THE COURT

1. CRIMINAL LAW--Involuntary Manslaughter--Jury Instructions.

In a criminal action where the defendant was charged with involuntary manslaughter, it is held that the trial court did not err in refusing to instruct the jury that a person is justified in using force likely to cause death or great bodily harm in defense of property only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.

2. SAME--Constitutionality of Criminal Statutes Justifying Use of Force to Protect One's Dwelling or Other Property. K.S.A. 21-3212 and K.S.A. 21-3213 are not unconstitutional as a violation of the Fourth Amendment rights of the deceased victim.

Appeal from Sedgwick district court; OWEN BALLINGER, judge. Opinion filed April 29, 1988. Appeal denied.

Mona Furst, assistant district attorney, argued the cause, and Robert T Stephan, attorney general, and Clark V. Owens, district attorney, were with her on the brief for appellant.

Jack Focht, of Focht, Hughey, Hund & Calvert, of Wichita, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

PRAGER, C.J.: This is an appeal by the State on a question reserved following the acquittal of the defendant, Lloyd D. Clothier, on a charge of involuntary manslaughter (K.S.A. 1987 Supp. 21-3404).

The evidence presented at the trial was essentially as follows: Defendant Clothier was awakened by his barking dog at his home around 3:30 a.m. on November 23, 1986. He got up and let the dog out of the house. A few minutes later, the dog returned. Defendant returned to bed, but the dog continued snarling. Defendant got up, took a revolver from his nightstand, and went to the dining room. He looked out the

window and observed someone reaching in the window of his automobile parked on the driveway. The person had not only broken the window but had actually opened the door of the vehicle. Defendant was scared and concerned, because his garage door opener was located inside the vehicle. Defendant testified that he wanted to scare the person away so he fired a warning shot through the window, not intending to hurt anyone. He then saw someone run behind the car and across the yard. He fired another shot, aiming down at the ground, to warn the person not to return. Defendant told his girl friend to call the police. He then stepped outside of the house and saw 15-year old Seanan Picard lying injured on the driveway. Picard later died from a gunshot wound to the head. Defendant was acquitted by the jury on the theory

that he acted in defense of his property.

The State appealed on a question reserved. The question presented is whether the district court erred in instructing the jury that a person may use deadly force to defend a dwelling or property other than a dwelling, without limiting such instruction to situations in which human life and safety are imminently endangered. The court instructed the jury as follows:

"INSTRUCTION 6

"Use of force in the defense of a dwelling. A person is justified in the use of force against another when and to the extent that it appears to him and he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon his dwelling. Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief.

"Use of force in defense of property other than a dwelling. A person who is lawfully in possession of property other than a dwelling is justified in the threat, or use of force against another for the purpose of preventing or terminating an unlawful interference with such property. Only such degree of force or threat of force thereof as a reasonable man would deem necessary to prevent or terminate the interference may be intentionally used."

At the close of the evidence the State submitted to the court a proposed jury instruction which stated:

"A person is justified in using force likely to cause death or great bodily harm in defense of property not a dwelling only when he reasonably believes that such force is necessary to prevent death or great bodily harm to [himself] [another]."

The instruction as actually given by the court, followed the language of K.S.A. 21-3212 and K.S.A. 21-3213, as well as PIK Crim. 2d 54.18 and 54.19. K.S.A. 21-3212 and K.S.A. 22-3213 provide as follows:

"21-3212. Use of force in defense of dwelling. A person is justified in the

use of force against another when and to the extent that it appears to him and he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon his dwelling."

"21-3213. Use of force in defense of property other than a dwelling. A person who is lawfully in possession of property other than a dwelling is justified in the threat or use of force against another for the purpose of preventing or terminating an unlawful interference with such property. Only such degree of force or threat thereof as a reasonable man would deem necessary to prevent or terminate the interference may intentionally be used."

The State argues that these statutes are in derogation of the common law which prohibits the use of deadly force in defense of property unless there is a threat of imminent bodily harm prior to the use of such force. At the time of the adoption of the Kansas Criminal Code in 1969, the proposal by the Kansas Judicial Council included the following concluding sentence to the proposed

K.S.A. 21-3213:

"It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defending property other than a dwelling."

That sentence was deleted by the legislature, demonstrating an intent to avoid limitation, thus leaving this section apparently as broad as K.S.A. 21-3212. See the author's comment in Vernon's Kansas Crim. C. § 21-3213, p. 200 (1971). In adopting that position, the Kansas legislature joined a minority of jurisdictions which permit the use of all reasonably necessary force in the defense of property other than a dwelling.

It is the position of the State on this appeal that the jury instructions on the use of force in defense of a dwelling and in defense of property other than a dwelling (K.S.A. 21-3212 and 21-3213) are

unconstitutional as a violation of the Fourth Amendment to the United States Constitution. The State bases its argument on the case of Tennessee v. Garner, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985), where the United States Supreme Court ruled that the Fourth Amendment prohibits the use of deadly force by a police officer to prevent the escape of a suspected felon unless it is necessary to prevent the escape and the pursuing police officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Tennessee v. Garner involved an action brought by a father in federal district court seeking damages against a police officer and the city of Memphis, Tennessee, under 42 U.S.C. § 1983 (1982), for claimed violations of

his deceased son's constitutional rights. The son was killed by the Memphis police officer as the son fled over a fence in the backyard of a house he was burglarizing. The officer used deadly force to prevent the escape, observing only that the burglar was 17 or 18 years old and of slight build. The United States Supreme Court held that the use of deadly force under those circumstances to prevent the escape of an unarmed suspected felon violated the Fourth Amendment civil rights of the deceased son.

The State on this appeal has taken the position that, if the police cannot use deadly force to stop a 15-year old burglary suspect without probable cause, why should a private citizen have that privilege? The State maintains that the defenses created by K.S.A. 21-3212 and

21-3213 constitute state action which violates the Fourth Amendment.

Counsel for the defendant first contends that this court lacks jurisdiction to determine the issue, because the issue of constitutionality of the two statutes was not raised in district court. We have considered the record in the case and note that the prosecutor objected to the failure of the trial court to give the requested instruction, and specifically mentioned the case of Tennessee v. Garner and that there was a constitutional issue involved. The trial court overruled the State's objection. Under the circumstances, we have concluded that this court has jurisdiction of the issue on this appeal.

In determining this issue, we note that the State concedes that the instruction

on defense of property given by the trial court was a correct statement of Kansas law. The statutory justification for the use of deadly force is contained in K.S.A. 21-3211, 21-3212, and 21-3213 and presents a fact issue to be determined by the trier of fact using an objective standard, i.e., from the viewpoint of a reasonable man in the accused's position. State v. Simon, 231 Kan. 572, 646 P.2d 1119 (1982).

The instructions as given by the court in this case follow the requirements of the Kansas statute. It has long been the rule in Kansas that all crimes are established by legislative act. There are no common-law crimes in Kansas, and there can be no convictions except for such crimes as are defined by statute. State v. Jackson, 239 Kan. 463, 721 P,2d 232 (1986); State v. Young, 55 Kan. 349,

356, 40 Pac. 659 (1895). As pointed out in State v. Sexton, 232 Kan. 539, 543, 657 P.2d 43 (1983), it is also the rule in this state that a criminal statute will not be extended by courts to embrace acts or conduct not clearly included within its prohibitions, citing State v. Doyen, 224 Kan. 482, 488, 580 P.2d 1351 (1978). Our criminal statutes are to be strictly construed. State v. Kearns, 229 Kan. 207, 208, 623 P.2d 507 (1981).

The State's argument in this case presents essentially a quarrel with the legislative wisdom of deciding to grant the defenses set forth in K.S.A. 21-3212 and K.S.A. 21-3213. In asking this court to change the rule of self-defense provided by statute, the State is in effect asking this court to exercise a legislative prerogative. The legislature

has made a determination that juries in Kansas should be allowed to determine whether the action of a person was reasonable or unreasonable in the use of force in defense of his property.

As to the claim of unconstitutionality based upon Tennessee v. Garner, we hold that the rule of that case has no application in a criminal case. Tennessee v. Garner must be followed in determining the rights of an injured victim in a civil action where he claims that excessive force was used by a police officer or by a private individual. The rule, however, has no application where an owner of property who used force in defense of his property is charged with the crime of involuntary manslaughter. In the opinion in Tennessee v. Garner, the Supreme Court of the United States does not at any place state that a

criminal defense such as we have in K.S.A. 21-3212 and K.S.A. 21-3213 would be a violation of the United States Constitution.

State v. Stokes, 215 Kan 5, 523 P.2d 364 (1974), was a case involving defense of the person, not property. There is no language in Stokes which changes the law of defense of property as provided by K.S.A. 21-3212 and 21-3213.

As pointed out by counsel for the defendant is his brief, the law in Kansas is clear that the legislature has determined by statute that a jury should determine whether or not the application of force in defense of property was reasonable under all the circumstances existing. The trial court in this case had no right to exercise its judgment in determining the reasonableness of the defendant's actions, for to do so would

be an intrusion into the function of the jury. Based upon the reasoning set forth above, we hold that the trial court did not err in its instructions to the jury on the issue of the reasonableness of the force used by defendant in defense of his property.

The appeal of the State is denied.

APPENDIX B

(Thereupon, at 3:35 o'clock P. M. on the 12th day of May, 1987, the following proceedings were had, the defendant being present and the jury not being present.)

THE COURT: Mr. Puntch, do you have an extra copy of the amended complaint-information that was filed May 4, 1987?

MR PUNTCH: Let me check, your Honor. I did see one in the file.

THE COURT: I know there is one that's put in the back of the file that was filed, but I wanted to mark on one freely without defacing the original.

MR. PUNTCH: I have got it right here.

COURT: Now, then, each one of you have copies of the instructions and the verdict form. Before we get started I understand the State wishes to make an amendment to the complaint and information.

MR. PUNTCH: Well, your Honor, I am not sure I am making an amendment. Under the complaint information as filed the State alleged that the lawful act of defense of property was done in an unlawful or wanton (sic) manner in this case. And at this time the State elects to proceed on the theory that the lawful act of defense of property was done in an unlawful manner by use of excessive force.

THE COURT: Okay.

MR. PUNTCH: If the Court requires an amendment I shall prepare and file one with the Court but I am doing so in open court and that is the State's election.

THE COURT: As long as it is in the record that you are proceeding on a theory other than wantoness (sic) and it is just on that it is an unlawful act?

MR. PUNTCH: Yes, your Honor;

THE COURT: Excessive force. Okay. Now then, gentlemen, you both have copies of the verdict form and the eleven instructions. If either one of you have any objections let's hear them. The State always goes first.

MR. PUNTCH: Well, thank you, your Honor. Yes. With regard to this case, first of all the State proposed certain forms of instructions which the Court has a copy of, and it is the position of the State in this case that the State's first proposed instruction has been given with another addition.

The State's second proposed instruction is being given with some additions to it.

The State's third proposed instruction the Court has said it will not give, and I wish to make a record on that point.

THE COURT: Go ahead.

MR. PUNTCH: The State's third proposed instruction is that a person is justified in using force likely to cause death or great bodily harm in defense of property not a dwelling only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another. I have taken that instruction from language in the case of State v. Stokes, 215 Kansas at page 5. State v. Stokes was a case which involved self defense. In that case the Supreme Court approved an instruction which stated the basic law of self defense in the State of Kansas and which further had the language I just quoted to you. I believe that is still

the law in the State of Kansas, that in self defense a person may not use deadly force unless that person reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.

It is the position of the State of Kansas, your honor, in that case that a person who is merely defending property or defending a dwelling has no right to use any greater force than a person would be able to use in defense of their own life. It is illogical and inconceivable that a person would be able to take another's life in defense of themselves only under circumstances where they fear great bodily harm or in taking their own life. But to take another person's life merely in defense or (sic) property without such apprehension of great bodily harm or death to someone else, it is I believe merely a logical extension of the

law arguing from self defense to defense of property or defense of a dwelling. I suggest that there is some support for that position in the case of State v. Johnson, 6 Kansas Appeals 2d 750. In that case the person was charged with aggravated assault when he shot at some persons who were on his property. He also was attempting to make an arrest during the course of that case. He was convicted of aggravated assault. Part of the theory was that the defense of property in that case involved the use of excessive force; that is, the use of the weapon. The interesting part about that case is that it cites KSA 21-3216, the type of force which a person may use in making an arrest.

Now, I note an arrest situation is an inherently dangerous situation when a private person is attempting to make an arrest. It is a confrontative situation

when a person is attempting to make an arrest under those circumstances where the danger is much higher than merely attempting to protect your property. The statute clearly states you may use deadly force under those circumstances when that person reasonably believes the person may cause great bodily harm if they do not use force in apprehending the individual.

State v. Blocker in 211 Kansas page 185 cited in Stokes as support for the position that person may use only such force as is reasonably necessary up to that point to defend themselves. State v. Stokes was later cited with approval in the case of State v. Cates which is in 222 Kansas but I don't remember the exact page. It is a case out of Sedgwick County, Kansas, and again was merely to support the proposition that deadly force may be used only to repel deadly force.

In the case of Tennessee v. Garner in a United States Supreme Court case back in 1985 the Supreme Court found it a matter of constitutional law that a policeman may not use deadly force to shoot a non-violent fleeing felon, and the point I am making with all of that is the trend of the courts of this country are that although property rights are important the preservation of human life is much more important and that when deadly force is used it can only be used under strictly scrutinized parameters, and the jury is entitled in this case to be instructed on the law as to the use of deadly force as was used in this case and that it is I believe the law of the State of Kansas as it exists at this time, and I object for those reasons for that not being included, your Honor.

With regard to the instructions proposed which were proposed by the Court

the State has no objection to Instruction No. 1, the State has no objection to Instruction No. 2. The State has no objection to Instruction No. 3.

With regard to Instruction No. 4 it is the position of the State of Kansas in this case that the State could proceed on the theory that the acts which the defendant committed in this case as has been testified to from the witness stand fall into two separate categories, and that the jury was entitled to be instructed on each one, that the Defendant's acts were lawful in that he was defending property or as he testified a dwelling, but they were done in an unlawful manner by the use of excessive force and that is the theory upon which the Court has instructed after the State's election. I am merely preserving for the record the State's position that

this case is different from the case of State v. Betty Warren, and I will get that cite for you in a moment.

MR. FOCHT: 5 Kansas Appeals 2d.

MR. PUNTCH: Yes, I know it is 5 Kansas Appeals something. I don't have it with me. Thank you, counsel. As I am sure the Court is aware State v. Warren says that when you are talking about self defense that conduct may be lawfully done in an unlawful manner. Lawful conduct may be done unlawfully but self defense can't be done in a wanton manner. That is basically the import of State v. Warren.

It is my argument to the Court and I believe based upon the earlier argument I made about the use of deadly force in self defense applying to defense of property that defense of property is quite different from self defense, that when you are merely talking about objects

that there is a higher standard of care which applies to that than applies to protecting one's own life, that you should not be able to use deadly force without some higher standard, that there is a higher standard that applies in protecting property, using deadly force to protect property than there does to protect another human life and because of that the Supreme Court ruling in State v. Warren is not applicable here in that the Defendant's acts in this case although lawful can in fact be done in a wanton manner, that the jury could find that the force which was used by the defendant in this case was not excessive but that the manner of application of that force in this case was wanton. And I am stating this on the record merely to preserve the record. I have made the election as I noted before and we are proceeding on that theory and my purpose

in this part of the argument is merely to preserve that.

The State has no objection to Instruction No. 5, Instruction No. 6, Instruction No. 7, Instruction No. 8, Instruction No. 9, Instruction No. 10, Instruction No. 11.

THE COURT: We will take these up as they were presented to the Court with the State's objections first.

MR. PUNTCH: Your Honor, excuse me. I have also reviewed the verdict form. The State has no objection to the verdict form.

THE COURT: Thank you. Instruction No. 4 was changed to fit the amendment that the State made to fit the theory that they are following in the case at this time. No. 6, there are two paragraphs and the first paragraph is just exactly verbatim what the statute says is the right to use force in the

defense of a dwelling. No more, no less. It is just exactly what the statute says. And the second paragraph is the same. It is what the statute says the use of force in defense of property other than a dwelling may be. It is exactly what the legislature said it shall be, no more and no less. And if the legislature wants to change it they can but they haven't done so. The Court is going to leave the instructions in the respect just like they are.

Now, then, any objections by the Defense?

MR. FOCHT: If it please the Court, I am not going to take a great deal of time making a record as to what went on prior to this time. Suffice it to say that we thoroughly hacked out I think both positions of the State and the defense and it led to the State taking the action your Honor has indicated and

the instructions being prepared as your Honor has indicated.

My only objections to the instructions at this point go to Instruction No. 7, which I do not believe to be applicable to this case, and that is basically it.

I have read the verdict form. I submitted to your Honor certain requested instructions prior to this time, you have taken them into consideration, selected what you wanted and rejected what you chose to. I, of course, think mine were better than yours but that is the way lawsuits are made so I have made my record.

THE COURT: Well, I think you are right. Now, I was thinking we would probably have to go ahead and excuse the jury until morning. We will probably go a little after 5:00, 5:15, 5:20 or maybe even 5:30.

MR. PUNTCH: I have no objection. How long will we be having for final argument?

THE COURT: That was my next statement. We started out with one hour. We got down to 30 minutes before we come back out here. I would like like (sic) everything to cut it to 20.

MR. PUNTCH: Your Honor, I don't think we would be able to put on our final argument in 20 minutes a side. The State would request at least 30.

THE COURT: I think I have applied all the pressure I could apply. I will give you 30 minutes. Both of you want some kind of warning?

MR. PUNTCH: Yes, your Honor. The State will divide its closing argument half and half and I think we would each like a two minute warning.

THE COURT: Mr. Focht?

APPENDIX C

APPENDIX C

D. K.S.A. 21-3212 and K.S.A. 21-3213, and the Jury Instructions Based Upon Them, are Unconstitutional Under the Equal Protection and Due Process Clauses of the 14th Amendment and §§1-2 of the Kansas Bill of Rights.

The prosecutor argued before the Court that the statutes and the jury instructions which were based upon them were unconstitutional under the provisions of Tennessee v. Garner. (IV R 574-575). The implication was that it was per se unconstitutional to allow the defendant a legal defense which would not be applicable to a law enforcement officer in the same situation (IV R.575). Although the prosecutor did not specifically mention the due process and equal protection clauses of the 14th Amendment, nor their counterparts found

in § 1-2 of the Kansas Bill of Rights, [Manzanares v. Bell, 214 Kan. 589, Syl. 5, 522 P.2d 1291 (1974)], he did state that "although property rights are important the preservation of human life is much more important and that when deadly force is used it can only be used under strictly scrutinized parameters . . . " (IV R. 575). This was sufficient to preserve these issues on appeal. In addition, the constitutionality of a statute can be considered even if for the first time on appeal, when necessary to determine the merits or where the issues can not be intelligently decided without doing so. Van Sickle v. Shanahan, 212 Kan. 426, Syl. 3, 511 P.2d 223 (1973); State v. Nelson, 210 Kan. 439, Syl. 4, 502 P.2d 841 (1972). The constitutional issues involve a denial of a fundamental right and are therefore necessary to a final decision. State v. Puckett, 230

Kan. 596, Syl. 1, 640 P.2d 1198 (1982).

1. **THE STATE-CREATED LEGAL DEFENSES IN K.S.A. 21-3213, AND THE JURY INSTRUCTIONS GIVEN THEREUNDER, VIOLATE THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF THE VICTIM, AND ALL CITIZENS, TO EQUAL PROTECTION OF THE LAW.**

Equal protection analysis requires strict scrutiny of a legislative classification when the classification

impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. State ex rel. Schneider v. Liggett, 223 Kan. 610, 576 P.2d 221 (1978). In such cases the courts apply a stringent test which strips away the protective presumption of

constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. Id. When "suspect classifications" or "fundamental interests" are involved, the burden of proof falls upon the state to justify the classification as necessary to the accomplishment of some compelling state interest. Loving v. Virginia, 388 U.S. 1, 18 L.Ed.2d 1010 87 S.Ct. 1817 (1967); State ex rel. Schneider v. Liggett, supra. The determination of whether the statute infringes upon a "fundamental interest" depends upon whether such interest is explicitly or implicitly guaranteed by the Constitution. San Antonio School District v. Rodriques, 411 U.S. 1, 36 L.Ed.2d. 16, 93 S.Ct. 1278 (1973), reh. denied 411 U.S. 959, 36 L.Ed.2d 418, 93 S.Ct. 1919; State ex

rel. Schneider v. Liggett, supra.

The right to life is a fundamental, inalienable, natural right, explicitly guaranteed to each citizen of the United States and Kansas which can not be denied without equal protection of the law. U.S. Const. amend. XIV; Kansas Bill of Rights, § 1; Screws v. U.S., 325 U.S. 91, 123, 134-135, 89 L.Ed 1495, 65 S.Ct. 1031 (1945) (concurring and dissenting opinions); Mattis v. Schnerr, 547 F.2d 1007, 1017 and n. 23 (8th Cir. 1976), vac moot sub nom Ashcroft v. Mattis, 431 U.S. 171 (1977); State v. Harris, 90 Kan. 807, 817, 136 P. 264 (1913). When such a fundamental right is involved, the compelling state interest test requires the court to consider the nature of the rights affected by the legislation, the classification established, and the governmental

interest which made the classification necessary. Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974); Manzanares v. Bell, 214 Kan. 589, 600, 522 P.2d 1291 (1974). When the State's statute under this test contravenes the inherent constitutional rights of the citizens by failing to show a more compelling state interest, it must be struck down. Loving v. Virginia, 388 U.S. 1, 12, 18 L.Ed.2d 1010, 87 S.Ct. 1817 (1967); City of Baxter Springs v. Bryant, 226 Kan. 383, 386, 598 P.2d 1051 (1979).

The State of Kansas has the right to act in protection of the public by promoting the law and order, and by designating certain actions, such as burglarizing a vehicle or a home, as criminal under the State's criminal code. State ex rel. Schneider v.

Liggett, supra at 615. This includes the right to abrogate the common-law when its principles are no longer suited to the conditions and wants of the people and the times. Manzanares v. Bell, supra, 214 Kan. at 589. The United States Supreme Court's decision in Tennessee v. Garner, 471 U.S. 1., 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985) recognized the fact that the common-law rule which allowed law enforcement officers to use deadly force to effect the arrest of even a non-violent suspect had outlived its usefulness and was unconstitutional. Id. at 11-15. As the United States District Court for Kansas put it:

> Examination of the history of the common law felony arrest privileges reveals that it is the example par excellence of a rule that has outlived its underpinnings of principle and policy.

Jacobs v. City of Wichita, 531 F.Supp. 129, 131 (1982). That Court went on to say that "the entire scope of the rule was to protect the constable from criminal liability." Id. It is truly ironic that now the law enforcement officer is no longer protected from criminal liability due to the unconstitutionality of a rule which, in Kansas, provides a complete criminal defence (sic) to a private citizen who kills a would-be, non-violent burglar trying to break into a mere vehicle. The Court in Tennessee v. Garner held that the use of deadly force by a police officer in this situation is prohibited by the Constitution. A State can not be allowed to adopt legislation which creates and validates an unconstitutional defense based merely on the status of who pulled the trigger. If the constitutional

rights of a victim are violated by a statute which provides a legal defense to a law enforcement officer who kills a non-violent suspect without first possessing the fear of imminent danger to himself or another, then the constitution must also prohibit the adoption of a statute which provides a legal defense in criminal and civil law to the same activity when accomplished by a private citizen. Such "state action" by a legislature in purporting to provide a defense to the use of deadly force in protecting property under the same circumstances cannot survive constitutional scrutiny. See Manzanares v. Bell, supra, 214 Kan. at 602-603. There is no compelling state interest in allowing a private property owner to blow away a person for merely interfering with property when those trained to uphold the

laws and to keep order in the State of Kansas and the United States are constitutionally prohibited from doing the same. The nature of the right to life is so basic and fundamental that there can be no state interest, even that of protecting one's property from unlawful interference, compelling enough to justify its arbitrary denial by private vigilantes but not by trained law enforcement personnel sworn to uphold the rights of all citizens under the Constitution. See Mattis v. Schnarr, 547 F.2d 1007, 1019 (8th Cir. 1976), vac moot sub nom Ashcraft v. Mattis, 431 U.S. 171 (1977). The jury instructions we well as the statutes involved must be disapproved as they have been interpreted herein for violating the Equal Protection clause of the 14th Amendment and §§ 1 and 2 of the Kansas Bill of Rights.

2. THE STATE-CREATED LEGAL DEFENSES IN K.S.A. 21-3212 AND K.S.A. 21-3213, AND THE JURY INSTRUCTIONS GIVEN THEREUNDER, VIOLATE THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF THE VICTIM, AND ALL CITIZENS, TO DUE PROCESS OF LAW.

The Fourteenth Amendment, as well as §§ 1-2 of the Kansas Bill of Rights, guarantee that no one shall not be denied the fundamental right to life without due process of law. Roe v. Wade, 410 U.S. 113, 157, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973) reh. den. 410 U.S. 959; Johnson v. Zerbst, 304 U.S. 458, 462, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938); Landrum v. Moats, 576 F.2d 1320, 1325 (8th Cir. 1978) cert. den. 439 U.S. 912; Jacobs v. City of Wichita, 531 F.Supp. 129, 132 (D. Kan. 1982); . Included in due process is

the procedural safeguard of a trial requiring that proof of guilt beyond a reasonable doubt be shown by the State. Palko v. Connecticut, 302 U.S. 319, 327, 82 L.Ed. 288, 58 S.Ct. 149, 153 (1937; Mullaney v. Wilbur, 421 U.S. 684, 701, 704, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975).

The applicable test in determining whether legislation transgresses upon the guarantee of due process of law is a determination of whether the statutes bear "a 'reasonable relation' to a permissible legislative objection." Manzanares v. Bell, supra, 214 Kan. at 602. Due process emphasizes the fairness between the State's action (here, creating the statutes in question which allowed the defendant to summarily kill the victim without benefit of a trial) and the individual dealing with the State

(the victim, Seanan Picard), and whether that action is adopted in the interest of the community. State ex rel. Schneider v. Liggett, supra, 223 Kan. at 613-614. In making its decision, the Court must balance all relevant and conflicting factors involved. Bartkus v. Illinois, 359 U.S. 121, 128, 3 L.Ed.2d 684, 79 S.Ct. 676 (1959), reh. den. 360 U.S. 907. If, after analysis, there exists no reasonable basis for the State action, it must be held unconstitutional. See Manzanares v. Bell, supra, 214 Kan. at 603 (citing Tri State Hotel Co. v. Londerholm, 195 Kan. 748, 408 P.2d 877).

There is no reasonable basis to allow private citizens to kill non-violent, would-be thieves or vehicle burglars when the punishment for the crime being committed by the victim at the time of death, after the attendant

procedural safeguard of a trial and conviction on proof beyond a reasonable doubt, is only a 3-10 year maximum prison term, had he even been an adult, See K.S.A. 21-3715; K.S.A. 1986 Supp. 21-4501(d)(2). The only state interest that could possibly be sufficiently compelling to justify the killing of one human being by another when the first is interfering with property is to protect the life or safety of the actor or another. See e.g., Jabobs v. City of Wichita, supra, 531 F.2d at 132. The victim in the present case was reaching unlawfully into a vehicle parked twenty-seven feet from the defendant's home. He had, however, exhibited no weapon, no threat of violence, and no indication whatsoever of any intent to come near the defendant's home or person. The United States Supreme Court has

already ruled, in a similar scenario, that it would be unconstitutional for a police officer to take the suspect's life, absent the fear or threat of imminent death or bodily harm. Tennessee v Garner, supra, 471 U.S. at 11.

There is no reasonable basis to afford greater protection in civil or criminal actions to a private citizen in protecting his property than is given any other person in protecting human life. To do so is to authorize the summary execution of a suspect, without benefit of a trial, or other procedural safeguards of due process of law, for a mere property crime. This is state sanctioned act which is abhorrent to the Constitution of both Kansas and the United States and which can not stand up to the strict scrutiny afforded such statutes when they impinge on fundamental

rights. See Mattis v. Schnarr, supra, 547 F.2d at 1019, n.29.

The use of deadly force in any situation is a privilege, not a right, and can be exercised only in the most limited circumstances. 1 Wharton's Crim. Law and Procedures, §221 (1957); Falco v. State, 407 So.2d 203, 207-208 (1981 Fla.); State v. Mounkes. 88 Kan. 193, 197, 127 P. 637 (1912). (Citing Gen. Stat. 1090 § 249). To allow its use without requiring fear of imminent, serious injury to human life is to deny the Constitutional right to life without benefit of equal protection or due process of law.

> [T]he preservation of life has such moral and ethical standing in our culture and society, that the deliberate sacrifice of life merely for the protection of property ought not to be sanctioned by law.

Jacobs , supra, 531 F.2d at 131 [citing

Professor Wechsler, 35 A.L.I. Proceedings 285 (1958)].

3. THE STATE LEGISLATURE HAD ADAPTED K.S.A. 21-3212 AND K. S. A. 21-3213 IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF KANSAS BY PURPORTING TO IMMUNIZE OTHERWISE CRIMINAL HOMICIDES WHEN DONE SOLELY TO PREVENT OR TERMINATE INTERFERENCE WITH PROPERTY OTHER THAN A DWELLING.

The State may adopt legislation which changes the common law or creates new rights when it is reasonably necessary, based upon its "police power", to promote the general welfare and safety of the people. State ex rel. Schneider v. Liggett, 223 Kan. 610, 615, 576 P.2d 221 (1978); Williams v. City of Wichita,

190 Kan. 317, 331-332, 374 P.2d 578 (1962) app. dis. 375 U.S. 7, reh. den. 375 U.S. 936 (1963). But when such legislation abridges the fundamental rights guaranteed citizens in the Constitution, it will not be allowed to stand. Palko v. Connecticut, 302 U.S. 319, 327 82 L.Ed. 288, 58 S.Ct. 149, (1937); Snyder v. Masschusetts, 291 U.S. 97, 105, 78 L.Ed. 674, 521 S.Ct. 330 (1933); Manzanares v. Bell, 214 Kan, 589, 603, 522 P.2d 1291 (1974). The Kansas legislature has, in K.S.A. 21-3213, created a new right to use deadly force by a private party in defense of property; such a statute, and jury instruction, denies the victim his fundamental right to life without affording him due process or equal protection of the law. See Jacobs v. City of Wichita, supra, 531 F.2d at 132.

In K.S.A. 21-3213, the legislature codified the common law which already allowed the use of deadly force in defense of a dwelling. See State v. Countryman, 57 Kan. 815, 48 P.137 (1897); State v. Mounkes, 88 Kan. 193, 197, 127 P. 637 (1912). There is, however, no "vested or protected right [acquired] in violation of the Constitution by long use . . ." Walz v. Tax Commissioner, 397 U.S. 664, 678, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); State ex rel Schneider v. Liggett, supra, at 612.

The present case deals with the most fundamental of human rights: the very right to live. Furman v. Georgia, 408 U.S. 238, 290, 33 L.Ed.2d 346, 92 S.Ct. 2726, (1976) reh. den. 409 U.S. 902, (J. Brennan, concurring). As such the denial of this

right is not a policy issue which would be better left to the legislature. Jacobs v. City of Wichita, supra, 531 F.2d at 131. It is a right upon which the state may infringe only in the most compelling circumstances. Id. at 132. Resolution of this issue is required to protect the rights of all citizens to life and to the civil liberties given them in the Constitution. See Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978) cert. den. 439 U.S. 912.

Both the statutes herein, and the jury instructions upon which they were based, denied the victim of his life without the procedures required by due process to determine guilt or innocence. The victim was also denied equal protection by allowing the defendant a complete defense to his homicide, arbitrarily applied to one class of

persons (private property owners) and not to another class of persons (law enforcement officers, as mandated in Tennessee v. Garner), and without any compelling state interest or rational basis to justify the distinction. The legislature can not set a bright line assessing both criminal and civil liability against a policeman for the death of a non-violent felon, yet providing no recourse at all against a private citizen for the same act. There clearly exists no rational basis nor compelling state interest to justify such an unconstitutional and arbitrary application of the law. As such both the statutes and the instructions as presently construed clearly violate the constitution and must be disapproved. State v. Baker, 11 Kan. App. 2d 4, Syl 1, 711 P.2d 759, rev. den. 238 Kan. 878

(1985). See also Board of Greenwood County Commissioners v. Nadel, 228 Kan. 469, 472-473, 618 P.2d 778 (1980); City of Baxter Springs v. Bryant, 226 Kan. 383, 385-386, 598 P.2d 1051 (1979). This Court should sustain this appeal, and by judicial decree construe the statutes in a manner consistent with the Constitution.